REPLY OF RESPONDENT IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,

Petitioners,

- and -

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF RESPONDENTS THE VERIZON TELEPHONE COMPANIES, GTE.NET LLC d/b/a VERIZON INTERNET SOLUTIONS, and VERIZON INTERNET SERVICES INC. IN SUPPORT OF REVERSAL

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STATEMENT PURSUANT TO RULE 29.6

Respondents' Rule 29.6 Statement was set forth at page *ii* and *iii* of Respondents' Opening Brief, and there are no amendments to that Statement.

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INTRODUCTION AND SUMMARY

Respondents and their supporting *amici* indulge an assumption that common carrier treatment of all privately owned transmission facilities is the norm. *See, e.g.*, Earthlink Br. 18-25; MCI Br. 30-38. In respondents' view, the FCC has a statutory obligation to ferret out the "pure transmission" component of any integrated service and convert it into the communications equivalent of an interstate highway. The opposite is true, and several provisions of the Communications Act of 1934 ("Communications Act" or "Act"), as amended by the Telecommunications Act of 1996 ("1996 Act"),[1] make that fact clear.

In reality, imposing government-compelled common carriage status on the transmission component of an integrated service offering is "radical surgery," historically undertaken only in very limited circumstances and based on specific legislative, administrative, or judicial findings. FCC Pet. 101a; FCC Reply 7-9. As an initial matter, a governmental decision to compel common carriage has always required a substantial evidentiary showing of necessity, grounded in the presence of market power and its actual or potential abuse.

In addition, the decision to subject *a portion of* an integrated service offering (*e.g.*, private information content services delivered over private transmission facilities) to common carriage obligations is an infinitely more extreme measure. That is so because imposing government-compelled access and price controls on the transmission component of these integrated services would sever control over private property otherwise intended to deliver the provider's own information content and content packaging services, which themselves are a form of speech.

Such a regulatory mandate forces the service provider to fundamentally alter the nature and content of the service—like converting a private movie theatre into a public forum for the display of any and all audiovisual productions. History

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[1] Pub. L. No. 104-104, 110 Stat. 153.

thus makes respondents' legal burden of proof a heavy one. If the Congress that passed the 1996 Act had intended to expand common carrier duties, one would expect to find substantial evidence of such a dramatic shift in regulatory posture. There is none.

All of the relevant legislative indicia point in precisely the opposite direction: Congress did not decide whether the transmission component of cable modem service (or any other integrated service) must be separated out and offered on common carrier terms. Rather, it left that issue to be decided by the Commission (as it always had been in the past) under the traditional test for common carrier status. Both before and after the 1996 Act, that test has asked two questions: (a) has the service provider voluntarily made an indiscriminate offering of a stand-alone transmission service; or (b) despite the service provider's preferred business model, do the presence of market power, lack of alternative transmission facilities, and a cost-benefit analysis justify imposing price and access mandates that *create* a common carrier offering that did not exist before. *See* FCC Reply 7-9; *see also Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) ("*NARUC I*"); *Cable & Wireless, PLC*, 12 F.C.C.R. 8516, 8521-22 (1997).

Respondents contend that the *Declaratory Ruling* sounds the death knell for Title II regulation because any service provider can "bundle" a pure transmission service with some minimal "information service" component, such as a time and date announcement before a traditional voice telephone call, and thereby "escape" common carrier regulation. MCI Br. 23; *see id.* at 22; Earthlink Br. 20-21; State & Consumer Groups Br. 17-23, 34. But the FCC has never suggested that such a minimalist approach is adequate to classify the entirety of the service as an integrated information service. And, of course, the two-part test for common carrier treatment, consistently applied by the Commission and the courts before and after the 1996 Act, precludes such a result in any event. A "bundle"

that is designed to disguise or exploit market power remains subject to FCC scrutiny for the presence and actual or potential abuse of market power, and if such can be proven, can be subject to regulatory obligations (up to and including common carrier mandates). *See* FCC Reply 8.

From this fallacious demise of all Title II regulation, respondents reason that *every* integrated service that includes a transmission component must be "stripped apart," with the transmission facilities dedicated to all comers by government dictate at cost-based rates. In essence, respondents contend that Congress silently used the otherwise innocuous definitional additions it made in 1996 to render compulsory common carriage status the default for every new delivery platform and every associated information content service, with the cumbersome and time-consuming forbearance remedy left as the only device to restore control to the facilities' owners. *See* Earthlink Br. 42-45; State & Consumer Groups Br. 33-34, 37; MCI Br. 28; AARP Br. 6.

The 1996 Act is a particularly odd home for respondents' "expanding universe" theory of common carriage. The 1996 Act was, after all, a *deregulatory* initiative, premised on Congress's determination that "natural monopolies" were a thing of the past. *See, e.g.*, S. Conf. Rep. No. 104-230, at 1 (1996) (Joint Explanatory Statement); H.R. Conf. Rep. No. 104-458, at 1 (1996) (Joint Explanatory Statement); *see also* H.R. Rep. No. 104-204, at 48 (1995) (1996 Act "open[ed] all communications services to competition" and "lift[ed] the shackles of monopoly regulation").

Respondents also make much of the so-called "mutual exclusivity" of "telecommunications services" and "information services," which they paint as the lynchpin of the *Declaratory Ruling*. *See* Earthlink Br. 37-39. While Congress's use of the phrase "via telecommunications" in the definition of an "information service" may or may not command "mutual exclusivity," neither does it prohibit it. Based upon its past conclusion that "enhanced services" and "basic services" were mutually exclusive, the Commission reasonably read the Act as according non-common carrier status to the transmission

facilities used by cable operators to deliver high-speed access to the Internet.

Unlike respondents' briefs and the decision below, the *Declaratory Ruling* properly applied the traditional test for common carriage to cable modem service. The FCC correctly found that there was no voluntary offering of indiscriminate access to the transmission component of cable modem service on a stand-alone basis, *see* FCC Pet. 95a-97a, and that the market for broadband Internet access services is robustly competitive, with multiple providers and technologies offering a "last mile" path to existing and potential subscribers, *see id.* at 49a-52a; *see also id.* at 100a-104a. In such circumstances, common carrier regulation is not only *not required* by the Act, but it is, as the United States recognizes, antithetical to the "crucial federal policy of encouraging the availability of broadband Internet access." FCC Br. 16; *see* FCC Pet. 104a; FCC Reply 18 & n.10.

Finally, many respondents attempt to use the principles of competitive and technological neutrality in the Act to extend the unjustified common carrier regulation of telephone company-provided DSL service onto the entire broadband market. Earthlink Br. 4, 25-26; State & Consumer Groups Br. 14-15, 43-45; MCI Br. 7, 20, 35-38. As Verizon has shown, the current regulation of DSL is a historical anomaly—one with no roots in careful analysis of the statutory definitions or present conditions in the separate broadband market. Verizon Br. 9, 28-33. Thus, Verizon has consistently maintained that the FCC must expeditiously establish a coherent and even-handed deregulatory regime for *all* broadband providers. For more than six years, DSL, a decidedly secondary player in a competitive market, has labored under the very regulation that the United States and the cable petitioners agree is unjustified, unnecessary, and harmful to the statutory goal of promoting investment in broadband facilities and services. FCC Br. 16, 30-32; NCTA Br. 29.

The only statutory flaw in the *Declaratory Ruling* was its decision to leave DSL saddled with the very regulation that the United States represents would have strangled cable

modem service in its infancy. *See* FCC Br. 16, 30-32. Congress clearly wanted the Commission to adopt a "hands off" policy for broadband services, *id.* at 30, but the statute requires that such a policy be pursued "without regard to any transmission media or technology," 1996 Act, § 706(c)(1), a principle that the United States acknowledges before this Court, FCC Reply 16, 18 n.10.

For these reasons, discussed in detail below, this Court should reject respondents' pleas, reverse the decision of the Ninth Circuit, and instruct the court of appeals to remand this docket to the FCC to expeditiously resolve the outstanding issue of the proper statutory classification and regulatory treatment of DSL and other broadband Internet access services that compete with cable modem service in light of this Court's decision.

ARGUMENT

I. The Communications Act Does Not Compel the FCC To Strip Out the Transmission Component of Broadband Internet Access and Subject It to Outdated Common Carrier Regulation.

A. The Definition of "Telecommunications Services" Does Not Contain the Sweeping and Mechanistic Rule of Common Carriage That Respondents Advocate.

Respondents and their supporting *amici* continuously repeat the mantra that cable modem service contains a "pure transmission" component and that the finished, integrated service is "offered to the public" as conclusive evidence that a portion of cable modem service must constitute a "telecommunications service" under the Communications Act. *See, e.g.*, Earthlink Br. 35-37, 39-40; State & Consumer Groups Br. 14-27; MCI Br. 15-21. This argument is wrong for at least five reasons.

First, respondents cannot prevail by showing that the Commission *could* classify the transmission component of cable modem service as a "telecommunications service." Rather, they must demonstrate that the FCC had no choice, *viz.* that it *must* classify part of cable modem service as a "telecommunications

service" because Congress has spoken directly to the issue and precluded the regulatory path taken by the agency. *E.g., Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Respondents can point to no statutory text or legislative history that even hints that Congress intended to preclude the Commission from treating the suite of functionalities offered by broadband Internet access as an integrated "information service," 47 U.S.C. § 153(20), and the transmission component as non-common carrier "telecommunications," *id.* § 153(43).

Respondents repeatedly invoke the rhetoric of antitrust law, speaking of anticompetitive "bundling" of services and incentives to discriminate against unaffiliated content providers. Earthlink Br. 15, 20-21, 23-25; State & Consumer Groups Br. 17-23; MCI Br. 22-24; NARUC Br. 11-18. But this is not a question of "bundling" different services. The question is whether a service provider can offer a single, finished Internet access service to its customers without having to disaggregate that service and make its component parts available to others on government-regulated terms. In any event, respondents' argument begs the question whether the Act allows this particular combination of high-speed transmission, proprietary content, email functionalities, and Internet access to be treated as an integrated service or whether the Act commands "unbundling" of content and transmission. Unfortunately for respondents, the statute itself answers these questions in the FCC's favor.

The statutory definition of "telecommunications" encompasses *all* pure transmission functions, including *both* non-common carrier offerings (or "private telecommunications") and common carrier services (or "telecommunications services"). *See* Verizon Br. 21-22. Respondents' proffered analysis improperly conflates the broader definition of "telecommunications" with the narrower definition of "telecommunications services" and would render the latter largely superfluous. *See id.*

In addition, the statutory definition of an "information service" contemplates a single, integrated service that consists of data storage and data manipulation functionalities *and* transmission accomplished "*via telecommunications*." 47 U.S.C. § 153(20) (emphasis added). The offering of the integrated service to the public, including the transmission component, cannot *ipso facto* transform the transmission component into a "telecommunications service." If it did, Congress's choice of the words "via telecommunications" would make no sense – the transmission component of every information service would be a "telecommunications service." But "telecommunications" has its own definition under the Act, 47 U.S.C. § 153(43), and Congress expressly eschewed placing the defined term "information service" in the definition of "telecommunications service," Verizon Br. 27-28; *see* FCC Br. 27 n.9; NCTA Br. 24; BellSouth Br. 18 n.3.[2] The fact that Congress used the term "telecommunications," rather than "telecommunication *service*," in the definition of "information service" demonstrates that the transmission component that underlies an "information service" offering can be *either* a common carrier "telecommunications service" or non-common carrier "telecommunications."[3]

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[2] The State and Consumer Groups contend that Congress's decision to omit the term "information service" from the statutory definition of "telecommunications service" is irrelevant, arguing that it was based entirely upon jurisdictional concerns over universal service. State & Consumer Groups Br. 26. This is incorrect. Nothing in the legislative history indicates that concerns regarding universal service formed the basis for Congress's decision. The statement of a single Senator – the only evidence upon which the State and Consumer Groups rely for their theory – nowhere suggests that universal service concerns were the *only* (or even primary) reason for the legislative change. 141 Cong. Rec. S7996 (daily ed. June 8, 1995) (statement of Sen. Kerrey). Respondents cannot rewrite history: a prior draft of this very legislation said exactly what respondents claim the statute now means, but that portion of the definitional sections *was intentionally removed* in the legislative process. *Compare* S. Rep. No. 104-23, at 18, 79 (1995), *with* 47 U.S.C. § 153(46).

[3] Rather than respond to Verizon's statutory arguments on the merits, respondent Earthlink is reduced to selective quotation from Verizon's filings before the Commission. *See* Earthlink Br. 19-20. Contrary to Earthlink's mischaracterization, Verizon did not take "precisely the opposite position"

(Cont'd)

Second, while respondents concede that the 1996 Act incorporated pre-existing precedent regarding what types of services are properly subject to common carrier obligations, *see* Earthlink Br. 21-26; MCI Br. 34-35, they completely ignore half of the test that applies under that precedent: the level of competition in the relevant market. The question whether a service is a common carrier "telecommunications service," and the related (and perhaps antecedent) question whether the Commission may force a carrier to divide out the transmission component of an integrated information service and offer that component separately pursuant to the so-called *Computer Rules*,[4] turn on the same market-based analysis. Absent a voluntary undertaking to provide indiscriminate access to the transmission component on a stand-alone basis to all who request it, both questions can be answered only after it is

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(Cont'd)
before the FCC but, rather, has maintained before the agency, in the Ninth Circuit, and in this Court that the presence of robust competition in the broadband market precludes the placement of common carrier duties on *any* broadband service provider. *E.g.*, Reply Comments of Verizon Communications, GEN Docket No. 00-185, at 2 (filed at FCC Jan. 10, 2001), *at* http://gullfoss2.fcc.gov/prod/ecfs retrieve.cgi?native_or_pdf=pdf&id_document=6512358434 ("[I]f the Commission reaffirms its numerous past conclusions that the residential broadband access market is competitive, then *all* participants in that market should be *freed* from regulation.") (emphases in original); *see id.* at 3, 24, 25. Verizon has also consistently argued that the FCC cannot classify any one broadband provider in isolation because doing so contravenes principles of competitive and technological neutrality in the Communications Act, violates the First Amendment, and is arbitrary and capricious. *Id.* at 27-30.

[4] As a result of the *Computer Rules*, certain wireline telephone companies that provide information services over their traditional "narrowband" telephone lines, including Verizon, have historically been required, among other things, to offer the transmission component of their information services to all content providers pursuant to cost-based rates embodied in federal tariffs and to acquire transmission for their own information service offerings pursuant to tariff. *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 F.C.C.R. 3019, 3036-40 (2002) ("*Wireline Broadband NPRM*"); *see also* FCC Br. 30-32 (describing the economic and regulatory burdens under the *Computer Rules* and Title II of the Communications Act).

determined whether "the public interest . . . require[s] the carrier to be legally compelled to serve the public indifferently" because the carrier "has sufficient market power." *AT&T Submarine Sys. Inc.*, 13 F.C.C.R. 21,585, 21,588-89 (1998); *see Cable & Wireless*, 12 F.C.C.R. at 8521-22; *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 924-25 (D.C. Cir. 1999); *NARUC I*, 525 F.2d at 642; *S.W. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481, 1484 (D.C. Cir. 1994); *see also* Verizon Br. 23-25; FCC Reply 8-9.[5]

The FCC and the federal courts have consistently applied this test based on the competitive state of the relevant market and the presence of existing or anticipated alternative transmission facilities, to determine whether the "radical surgery," FCC Pet. 101a, of requiring a carrier to separate out the transmission component of an integrated service and offer it on government-dictated price and access terms is necessary. And, as both the Commission and the D.C. Circuit have concluded, this test is perfectly consistent with the definitions added by the 1996 Act. *See* Verizon Br. 27.

In fact, the general rule, applicable both before and after the 1996 Act, is *directly contrary to* respondents' position. Absent "bottleneck" control over access to end-users, the FCC cannot compel any service provider to cede control over its delivery platform and to allow "all comers" to access the transmission component of an integrated service at cost-based tariffed rates. Respondents have no answer to the Commission's analysis of the competitive conditions in the broadband market, and so they simply feign ignorance as to the relevance of competition between alternative content providers and delivery systems.

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[5] *See also Amendment of Section 64.702 of the Comm'n's Rules & Regulations*, 77 F.C.C.2d 384, 468-69 (1980) (subsequent history omitted) ("*Computer II*") (declining to extend *Computer Rules* to carriers where they "d[id] not have . . . market power" and thus would not be in a position to act anticompetitively); *id.* at 428-30 (finding that it would not serve the public interest to subject enhanced service providers to traditional common carrier regulation because, among other things, the market was "truly competitive"); FCC Reply 7-8.

Respondents ignore established criteria for imposing common carrier duties for the simple reason that the time-honored standards are fatal to their claims. *See* FCC Reply 7-10 (discussing "long-settled standards" for imposing common carrier obligations). Under the proper market-based analysis, the one conducted by the FCC in the order under review, there is no basis for imposing common carrier duties on any participant in the broadband market. As Verizon demonstrated in its opening brief, Verizon Br. 26, 28, 31, and as the Commission has repeatedly found, there is no market problem that needs "fixing" because the broadband market is vibrantly competitive and growing only more so each day, *see id.* at 2 & n.2, 10, 26; *see also, e.g., United States Telecom Ass'n v. FCC*, 359 F.3d 554, 582 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313 (2004); *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003).[6]

While respondents advance a perfunctory argument that the 1996 Act's service definitions mandate common carrier status for all facilities-based information service providers, *see, e.g.*, Earthlink Br. 22-25, 46-47; State & Consumer Groups Br. 47-48; MCI Br. 36-37, nothing in the text or legislative history suggests that Congress wished to codify (let alone expand) the burdensome common carriage mandates of the *Computer Rules*. It is clear that the definitions of "telecommunications service" and "information service" contained in the statute parallel the concepts of "common carriage" and "enhanced services" as developed and applied prior to the enactment of the 1996 Act. *Cable & Wireless*, 12 F.C.C.R. at 8521-22; *Virgin Islands Tel.*, 198 F.3d at 926-27. The legislative history of the

[6] Certain respondents and *amici* attempt to demonstrate that the broadband market is not in fact competitive. *See* Earthlink Br. 15; ACLU Br. 8-11, 13-16; AARP Br. 9-16. This argument conflicts with literally dozens of findings by the FCC as well as two well-reasoned decisions of the D.C. Circuit. *See* Verizon Br. 2 & n.2, 10, 26. There are numerous existing and potential platforms over which broadband services can be provided, including cable modem, DSL, fiber, fixed wireless, 3G mobile wireless, broadband over powerlines, and satellite broadband services. *See id.*; *see also, e.g., Wireless Broadband Access Task Force Report*, GEN Docket No. 04-163, at 2-4, 12 (rel. Mar. 8, 2005), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257247A1.pdf; *Availability of Advanced Telecomms. Capability in the United States*, 19 F.C.C.R. 20,540, 2004 FCC LEXIS 5157, at *2, *12, *13-*44 (2004).

1996 Act also demonstrates that the definition of telecommunications service "recognize[s] the distinction between common carrier offerings . . . and private services." H.R. Conf. Rep. No. 104-458, at 115 (1996).[7]

It is equally clear, however, that Congress *did not* dictate which services fall within each category but, rather, "intend[ed] that the Commission would have the continued flexibility to modify its definition and rules pertaining to enhanced services as technology changes." H.R. Conf. Rep. No. 104-458, at 115 (1996). In the face of this pronouncement, respondents' assertion that Congress meant to freeze in place—and, indeed, to extend to new technologies—the regulatory regime that the *Computer Rules* established for the narrowband world of the 1970s and 1980s is preposterous.[8]

Respondents' arguments dwindle to nothing when placed against the larger statutory picture, *e.g.*, when the background and purpose of the 1996 Act are juxtaposed against the unique origins and limited scope of the FCC's *Computer Rules*. As to advanced services such as broadband Internet access,

[7] State and Consumer Groups' unexplained pronouncement that "the distinction between private and common carriage is not relevant to whether cable modem service is subject to regulation," State & Consumer Groups Br. 25 n.9, has no merit. "Telecommunications services" are subject to Title II regulation while "telecommunications" offerings are regulated, if at all, pursuant to Title I. Thus, the distinction between private and common carriage lies at the very heart of this case.

[8] At the same time, the suggestion made by the United States and the cable petitioners that the *Computer Rules* are automatically inapplicable here simply because they have never before applied to "cable companies" (whatever that means) is incorrect, *see* FCC Br. 17, 36; NCTA Br. 28-29; FCC Reply 10-14, as the United States effectively concedes elsewhere in its reply brief, *see* FCC Reply 16, 18 n.10. Cable operators have entered a new market for the facilities-based delivery of information services (along with cable services and voice telephony). Saying that "[c]able operators have not traditionally been regulated as common carriers," *id.* at 12, is an empty truism. Services (and hence at least initial regulatory classification) are defined by the functionalities delivered, not the corporate identity of the provider. The fact that the *Computer Rules* have never been applied to cable operators states the question presented to the FCC, not the answer. The answer depends on whether cable operators enjoy such market power over high-speed Internet access (or any part of it) that they must, in the public interest, be subject to unbundling of transmission and common carriage obligations.

the thrust of the 1996 Act is decidedly deregulatory. *See, e.g.*, 1996 Act, § 706; 47 U.S.C. § 230(b); S. Conf. Rep. No. 104-230, at 1 (1996) (Joint Explanatory Statement); H.R. Conf. Rep. No. 104-458, at 1 (1996) (Joint Explanatory Statement). The *Computer Rules*, by contrast, were intended to address *de jure* or *de facto* monopoly control over narrowband telephone lines—at that time the only source of transmission for data and computing services. *See* Verizon Br. 23-25; *see also* FCC Pet. 89a-90a n.139 (*Computer Rules* were directed at "bottleneck common carrier facilities"); *Computer II*, 77 F.C.C.2d at 466-68 (stressing importance of a carrier's monopoly control of local bottleneck facilities and the ability to abuse that control to its decision to require compliance with *Computer Rules*). At the time the *Computer Rules* were adopted, there was only "one wire" into the home—that of the local telephone company. *See* FCC Br. 35 n.15; FCC Reply 7-8.

Third, the chilling effect that common carrier requirements would have on the capital investment that the 1996 Act was intended to promote renders respondents' reading of the definitional sections of the Act all the more untenable. Section 230 of the Communications Act recognizes that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation," 47 U.S.C. § 230(a)(4), and, accordingly, sets forth the "policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation," *id.* § 230(b)(1)-(2).

Similarly, Section 706 of the 1996 Act requires the FCC and the states to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by, among other things, "utilizing . . . regulatory forbearance, measures that promote competition," and other "methods that remove barriers to infrastructure investment." 1996 Act, § 706(a)-(b). Where, as here, common carrier duties impede continued investment in and deployment

of new technologies, *see* Verizon Br. 29-31—a sentiment with which both the United States and NCTA agree, *see* FCC Br. 30-31; FCC Reply 17-18; NCTA Br. 29—these statutory pronouncements preclude the result that respondents seek.[9]

Fourth, in reality nearly every communications service contains some "pure transmission" or "delivery" component within it. Broadcasters and satellite television providers use parts of the electromagnetic spectrum to deliver programming without change in its form or content. Cable operators use hybrid fiber and coaxial cable systems to transmit programming to subscribers and to receive requests for programming. Internet and other information service providers typically supply at least some of the transmission necessary to allow their customers to access websites and databases across the country and around the world. Telephone companies such as Verizon are spending billions of dollars on next-generation transmission facilities (including digital switches and fiber-to-the-premises) to deliver a package of content and communications services, including video programming services, video-on-demand, proprietary data

[9] Respondents' contention that Section 706 evinces a backdoor Congressional intent to classify broadband Internet access services as "telecommunications services" because the "regulating methods" that it directs the FCC and the states to use to promote broadband largely apply to "telecommunications services" is absurd. *See* Earthlink Br. 43; State & Consumer Groups Br. 31-34, 39-41. First, nothing in Section 706 suggests that it was intended to alter the threshold test for properly classifying services or that it is the sole means by which the FCC can and should promote broadband. *See infra* pp. 16-17. Rather, Section 706 provides an additional tool by which the Commission may exempt services from regulatory burdens that might otherwise apply. Second, on its face, Section 706 authorizes the use of "other regulating methods that remove barriers to infrastructure investment," which are not limited to "telecommunications services." 1996 Act, § 706(a). Finally, Section 706 utilizes the term "telecommunications service" *only* in defining the state regulatory bodies with responsibilities under the statute, *id.*, and uses the separately (and more broadly) defined term "advanced telecommunications capability," which itself is defined as including "telecommunications" (rather than the narrower category of "telecommunications service") to describe the services that the statute covers, *id.* § 706(c)(1). When Congress uses "different words" it intends that they have "different meanings." *United States v. Bean*, 537 U.S. 71, 75 n.4 (2002).

services, security and home management services, and high-speed Internet access.

No one would suggest that all of these services include separate "telecommunications service" components that must be offered on common carrier terms simply because they rely on transmission to offer an integrated service to the public. Indeed, for decades the Commission has treated many "pure transmission" services as non-common carrier services, *see* Verizon Br. 24 n.9 (collecting authorities), and the Congress that passed the 1996 Act was well aware of this category of private carriage and presumably wished to preserve it, *see id.* at 23.[10]

Finally, a wooden rule forcing the separation of editorial content from transmission facilities built to deliver that content presents serious First Amendment issues. This Court has narrowly approved the imposition of "must carry" obligations on private communications facilities that provide editorial content only where there is a fulsome record documenting market power and the abuse of that power, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196-204 (1997); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661 (1994), and no court has ever upheld such requirements for the competitive broadband services at issue in this case. The presence of competition in the burgeoning broadband market precludes such a finding here and renders the imposition of a mandatory access regime unjustifiable under any test.

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[10] To the extent that respondents seek to rely upon matters of policy preference rather than statutory construction, *see, e.g.*, Earthlink Br. 28-29 (common carrier treatment is necessary for "consumers . . . to receive the benefit of information services provided by anyone other than the owners of transmission networks"), they commit the same error as Judge Thomas in his concurrence below, *see* FCC Pet. 34a (common carrier treatment "would enhance independent ISP access to telecommunications facilities, almost certainly increasing consumer choice").

B. The Debate over the "Mutual Exclusivity" of "Telecommunications Services" and "Information Services" Need Not Be Resolved in This Case.

Respondents make much of their disagreement with the FCC's position that "telecommunications services" and "information services" are "mutually exclusive." Earthlink Br. 37-39. This is a red herring. The Commission did not base its classification decision on this legal conclusion and it is, as a logical matter, irrelevant to the proper statutory classification of broadband Internet access.

In fact, the FCC's observation that "telecommunications services" and "information services" were "mutually exclusive" was entirely consistent with the Commission's prior precedent distinguishing between "basic" and "enhanced" services. *See Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11,501, 11,507-08, 11,524 (1998). Because, as respondents concede, the definitions at issue at least "parallel" the definitions that the FCC had developed prior to the 1996 Act, Earthlink Br. 23; *see* MCI Br. 34-35, even under their theory the statutory definitions can reasonably be interpreted in a manner consistent with the Commission's pre-existing precedent, *see* FCC Br. 22.

The key point, and one that respondents do not even attempt to refute, is the one discussed above and in Verizon's opening brief, *see supra* pp. 6-14, Verizon Br. 23-28—there simply is no indication that Congress intended to require the transmission component of all information services to be stripped out and offered on a common carrier basis regardless of the market power analysis. Thus, it was for the FCC to determine, using its past precedent establishing market power and its actual or potential abuse as the justification for imposing common carrier duties, whether such "radical surgery" is required in the broadband market. The Commission properly found that the competitive state of the broadband market precluded the exercise of market power by any player and that, thus, imposing common carrier duties was not in the public interest. FCC Pet. 102a-104a (waiving

application of *Computer Rules* to cable modem service); *id.* at 109a-114a (finding that, even where cable operators might offer broadband transmission service separately, there was no reason to compel the offering of such service on a common carrier basis).

II. The Existence of Forbearance Authority Cannot Create Any Inference That the 1996 Act Radically Expanded Common Carrier Treatment.

The fact that the FCC might remove common carrier regulations through the alternative legal paths left open by *Brand X* does nothing to undermine the Commission's initial classification of cable modem service as a non-common carriage offering. It is true that the FCC could determine that broadband providers offer transmission to Internet service providers on a "private carriage" basis, or it could, through formal waiver or forbearance proceedings, eliminate any common carrier regulations that might otherwise apply. *See* FCC Pet. 22a n.14; *id.* at 34a-35a (Thomas, J., concurring). But respondents are flatly wrong that forbearance is the only permissible means by which the Commission may proceed. *See* Earthlink Br. 42-45; State & Consumer Groups Br. 33-34, 37; MCI Br. 28; AARP Br. 6.

This is true primarily because the question as to how a service is classified is the proverbial *first step* under the Communications Act's regulatory scheme. *See* Verizon Br. 5-6; FCC Pet. 9a, 133a; *see also* Earthlink Br. 27, 30-31; MCI Br. 5, 18; *cf. Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 355-56 (2002) (Thomas, J., concurring in part, dissenting in part). If the service is properly classified as a non-common carrier offering at this first step of the analysis, then resort to a burdensome and potentially lengthy forbearance or waiver process is not necessary.

Respondents' assertion that Congress decided that any service that contains a "pure transmission" component and is ultimately offered to the public must initially face onerous common carrier regulation is exactly backwards. New technologies and new content services are being deployed every day, and it is in the initial development and deployment phases that the *absence of* regulatory constraint is

critical to success. Under respondents' view, burdensome common carrier regulation adheres to every new information content delivery system until the FCC can remove it through cumbersome and time-consuming forbearance proceedings. Congress did not intend the forbearance provision of the 1996 Act to soften the blow of a statutory expansion of traditional regulation. Rather, Congress meant to allow the Commission to continue the work of dismantling the legacy regime developed for monopoly market conditions—work that Congress commenced in the 1996 Act. *Cf. Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1032-33, *reh'g granted on other grounds*, 293 F.3d 537 (D.C. Cir. 2002).

III. Respondents' Heavy Reliance on the Anomalous Regulatory Treatment of DSL Is Misplaced.

Respondents rely heavily on the FCC's prior decisions treating DSL as a common carrier service to support their argument that the transmission component of cable modem service should be classified as a "telecommunications service." *See* Earthlink Br. 4, 25-26; State & Consumer Groups Br. 14-15; MCI Br. 7, 20, 35-38; FCC Pet. 31a-32a (Thomas, J., concurring); Verizon Resp. 16a; *see also* FCC Br. 17, 36; NCTA Br. 28-29. Their reliance is misplaced.

To be sure, and as respondents correctly recognize, the Act does require that functionally equivalent services are classified (and, ultimately, regulated) in a competitively and technologically neutral fashion. *See* Earthlink Br. 4, 25-26; State & Consumer Groups Br. 14-15, 43-45; MCI Br. 7, 20, 35-38. Indeed, the United States recognizes that a service must be defined by the functionalities it offers end users, not corporate identity or the nature of the technology used. *See* FCC Br. 23 (The classification of a service under the Act "must be resolved by reference to the nature of the provider's 'offering . . . to the public,' 47 U.S.C. § 153(46), and thus the classification 'turns on the nature of the functions that the end user is offered.'") (quoting FCC Pet. 94a); FCC Pet. 90a ("None of the [relevant] statutory definitions rests on the particular type of facilities used. Rather, each rests on the function that is made available."); *see also* FCC Reply 16.

However, the fact that competitive neutrality must be achieved requires reversal, not affirmance, of the *per curiam* decision below. As Verizon has shown, the Commission's decisions regarding DSL were not supported by any statutory or market analysis at all, but instead involved the reflexive extension of common carrier obligations based on the corporate identity of the provider. Verizon Br. 9. In any event, the FCC has initiated proceedings to adjust the regulatory framework that applies to telephone company-provided broadband services. *See Wireline Broadband NPRM*, 17 F.C.C.R. at 3020-21, 3024-29; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecomms. Servs.*, 16 F.C.C.R. 22,745, 22,746-49 (2001).

Moreover, given the competitive state of the broadband market, the only lawful result under the Commission's established criteria is to remove the obligations that apply to DSL, not to extend those requirements further into the competitive broadband market. Imposing common carrier duties, particularly on the distant second player in a competitive market, serves only to impede competition and discourage the very investment in advanced services that the FCC has a statutory duty to promote. *See* 1996 Act, § 706; 47 U.S.C. § 230. Indeed, the United States itself explains that "[r]egulating cable modem service as a telecommunications service would dramatically alter the regulatory environment that has fostered . . . investment and growth." FCC Br. 30; *see id.* at 30-31 & nn.11-12; FCC Reply 17-18; *see also* NCTA Br. 29. Accordingly, common carrier treatment of *any* provider in the competitive broadband market cannot be sustained.

The plain fact is that continuing to treat DSL providers as common carriers violates the Communications Act and FCC and federal court precedent regarding the proper criteria for imposing such duties, is inconsistent with the Commission's own findings in the *Declaratory Ruling* and elsewhere regarding the competitive nature of the separate broadband market, and is arbitrary and capricious on its face in light of the decision *not* to impose any regulatory obligations on cable modem service. Accordingly, the unlawful treatment of DSL, which

the FCC is now in the process of correcting, cannot support the tortured reading of the service definitions advocated by respondents and adopted by the Ninth Circuit.

Because the Ninth Circuit erroneously relied on the Commission's unlawful treatment of DSL, and because the FCC never addressed the question of regulatory parity, a remand remains necessary in this proceeding. Verizon again asks that this Court direct that Verizon's petition for review be remanded directly to the agency and that the Commission be directed to use this Court's guidance to *expeditiously* arrive at a proper statutory classification of DSL services. The FCC has a legal obligation to at least address Verizon's arguments, properly preserved before the Commission and the Ninth Circuit, *viz.* that the Communications Act, the First Amendment, and the Administrative Procedure Act command that regulatory burdens that result from the statutory classification of the services at issue be imposed without regard to corporate identity or delivery technology. The present regulatory schism in the broadband market is indefensible and is a cause of ongoing competitive and consumer harms.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's *per curiam* decision should be vacated and remanded to that court with instructions to remand the case directly to the FCC to expeditiously address the issues raised in Verizon's petition for review.

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